STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court
No. 126371

DARIN HENDRICK,

Defendant-Appellee.

Third Circuit Court No. 99-010970-02 and 00-011760-01
Court of Appeals No. 248892

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION

I.

If a probation order is revoked, the court "may" sentence the probationer in the same manner as the court might have done if the probation order had never been made. Is a sentencing court required to employ the sentencing guidelines when sentencing for a violation of probation, and, if so, does the fact of violation supply a substantial and compelling reason to depart from the guidelines range?

The People answer: "NO"
Defendant answers: "YES"

STATEMENT OF FACTS

The defendant was charged in the third judicial court with one count of home invasion on case number 99-10970. On March 20, 2000 a plea offer was made to the defendant that if he pled guilty to attempt home invasion, he would be sentenced to five years probation, with the first year in the county jail, and defendant was to have no contact with the complainant and make restitution. (1a-2a)

The defendant admitted that he was on probation at that time. (3a) The defendant further admitted that he went to the house in question, with the codefendant, and knocked on the door to try and get the complainant to talk with the codefendant. Defendant kept knocking on the door and believed the complainant thought he was trying to get into the house. Knowing the complainant did not want him in the house, the defendant went around to the back door, where the codefendant had already opened the back door, and entered the home of the complainant. (4a-5a)

On April 3, 2000, the defendant was placed on five years probation, with the first year in the Wayne County Jail. He was ordered to have no contact with the complainant and share the cost of restitution with the codefendant. The court ordered the defendant to take 26 weeks of batterer's counseling. The court allowed the defendant to have work release while serving in the jail. (6a-7a)

On October 31, 2000 the defendant was arraigned on case number 00-11760 on the charge of possession of a Molotov cocktail in the Third Judicial Court before Hon. Thomas Jackson. The defendant was on notice that there was a fourth offender notice filed. (8a)

On December 8, 2000 the defendant was before the Hon. Vera Massey Jones for a violation of probation on case number 99-10970 for failing to report since being released from the Wayne

County Jail, and a final conference on the possession of the Molotov Cocktail, case number 00-11760. Defendant sought a Cobbs evaluation at that time. (9a-10a)

On December 18, 2000 the defendant was before Hon. Vera Massey Jones for the violation hearing on 99-10970. John Weiss of the Probation Department for the Circuit Court and received defendant's file about a week after defendant was placed on probation on April 3. There was testimony that the probation department mailed a letter to an address that defendant's family no longer lived at. The defendant agreed he had been told by the Court at sentencing that he would be on probation. Defendant agreed that he did not report. The trial court stated that defendant was technically in violation, but the Court would continue defendant on probation. (13a-20a)

On April 9, 2001, the defendant was before Hon. Vera Massey Jones on case number 00-11760, possession of a Molotov cocktail, with an habitual offender, fourth filed in the case. A plea offer was made by the People that if the defendant would plea guilty to the charge of possession of the Molotov cocktail, the People would agree to dismiss the habitual charge. Further the People agreed to a sentence of five years probation, with the first year in the county jail, and any other conditions recommended by the probation department. The court and defendant agreed that the plea in this case would be an automatic violation of probation in the other case, the home invasion case. The Court explained to the defendant that he would be sentenced on that case to continued probation as well as on the present case. (21a-22a;23a)

The defendant pled guilty and stated that he went to a gas station, took a 40 ounce bottle from the car, filled it with gas, put a rag in it, was going back to the location where everything had happened, and was planning to scare someone with the gas filled bottle and rag. Defendant knew that the bottle would explode on impact. (24a) The court discussed with the defendant the fact that

he had previously been on probation because of "helping" some friend. The trial court indicated to the defendant that if he violated his probation, then the court would sentence him to 20 to 40 years in prison. (25a-26a)

At this time defense counsel then inquired about the defendant's credit for time served. Counsel indicated that the defendant had been sentenced by Judge Fresard for a violation of probation on a receiving and concealing case. (27a-28a)

On April 30, 2001, the trial court sentenced the defendant to the sentence agreement of five years probation, with the first year in the county jail, and continued the defendant on probation on the other case. (29a-30a)

On July 30, 2001, the defendant was arraigned before Hon. Vera Massey Jones for violation of probation on cases 99-10970 and 00-11760. Defendant was charged on case 01-63905 for felon in possession of a firearm. (31a)

On August 6, 2001 the defendant appeared before Hon. Vera Massey Jones for violation of probation hearing on cases 99-10970 and 00-11760. Courtroom Deputy Sheriff, Barry Healy, testified that he had transported the defendant from the jail to the courtroom on that day. While bringing defendant into the lockup, the defendant gave Healy a letter, folded up, and asked Healy to give it to the judge. The letter was marked as People's Exhibit 1and admitted into evidence. (32a-36a)

Police Officer James Cross testified that on July 23, 2001 at 10:15 p.m. he was in the area of Parkinson and Edward in the city of Detroit, responding to a run of "person with a weapon." While in the area Cross observed the defendant walking northbound on Parkinson toward Edward with a long gun in defendant's right hand, leaning against his right shoulder. Cross approached the

defendant, identified himself, and ordered the defendant to place it down. The weapon was recovered and placed in evidence, and the defendant was arrested. No shotgun shells were found on the defendant, nor a shotgun firing pin, which is required on a .12 guage shotgun. (37a-40a)

The court took judicial notice of the defendant's prior convictions for attempted home invasion and possession of a Molotov cocktail, which were convictions before the trial court. (41a)

The defendant testified that after his arrest on July 23rd he made a statement to the police where he told them that he was outside, someone rode up to him with the gun in question, told defendant that he wanted to sell the gun, and defendant claimed the person said it was a BB gun. Defendant bought the gun from him and described the person as looking like a dope fiend. Defendant claimed he never examined the gun to determine whether or not it was a BB gun or a shotgun. Defendant claimed that although he lived in Allen Park at the time, he was bringing the gun to a friend's house in the area to leave it there until he brought it home to shoot at targets. (42a-46a)

The trial court found the defendant guilty of violation of probation. (47a)

Defendant was sentenced for the violation of probations on case number 99-10970 and 01-11760 before Hon. Vera Masey Jones on August 23, 2001. Defense counsel indicated that the guideline range was calculated at 19 to 38 months. The trial court indicated that the guidelines did not apply to probation violations. The court further noted that the defendant had been a habitual fourth when charged with the possession of the Molotov cocktail, which carried a penalty up to life. (48a-49a)

The trial court summarized the history of this case and found out that when the defendant had been placed in the Wayne County Jail for a year in April of 2001 he was released within 30 days,

sometime in May o9f 2001. The court indicated that the defendant's conduct was such that he did not belong out on the street. The court knew that the defendant was planning on using the Molotov cocktail at his sister's home. The defendant had gone to bust down the door of his friend's wife. The court stated the defendant had no respect for women or their lives. The court indicated that the defendant was back in his sister's neighborhood with the gun. The court then sentenced the defendant on the possession of the Molotov cocktail to 10 to 20 years and one to five on the attempted home invasion case. (50a-53a)

The Michigan Court of Appeals remanded from resentencing finding that a violation of probation sentence is subject to the sentencing guidelines in *People v Hendrick*, 261 Mich App 673, 684 (2004).

This Court granted leave in this case on November 4, 2004.

STATEMENT OF JURISDICTION

This matter is before this Court by order of this Court dated November 4, 2004 on leave granted.

ARGUMENT

I.

If a probation order is revoked, the court "may" sentence the probationer in the same manner as the court might have done if the probation order had never been made. A sentencing court is not required to employ the sentencing guidelines when sentencing for a violation of probation, but, if they are required, then the fact of a violation supplies a substantial and compelling reason to depart from the guidelines range.

STANDARD OF REVIEW

This case presents an issue concerning the application of the legislatively created sentencing guidelines and is reviewed de novo. *People v Hegwood*, 465 Mich 432 (2001).

DISCUSSION

Until the creation of the legislatively created sentencing guidelines there would have been no question here. Historically, under *People v Williams*, 223 Mich App 409 (1997) and *People v Edgett*, 220 Mich App 686 (1997), the judicially created guidelines were not applicable to probation violation cases. *People v Reeves*, 143 Mich App 105, 107 (1985) stated the reasoning why the guidelines were not applicable to probation violation:

> A review of the SIR and all the factors to be included reveals that the guidelines are not equipped to deal with probation violations. There is no method provided for the inclusion of the conduct that resulted in the probation violation in the computation of the sentence. The SIR would look identical on both dates: when probation was first imposed and when the probation was violated. Accordingly, we will not require a SIR in probation violation situations.

The Court of Appeals, after being ordered to consider whether the legislatively created sentencing guidelines apply to sentences for violation of probation, found in *People v Hendrick*,261 Mich App 673 (2004) that the guidelines in fact do apply. That court believed that MCLA 771.4 required such a finding as the statute states that the sentencing court may sentence a defendant for violation of probation "in the same manner and to the same penalty as the court might have done if the probation order had never been made." The court remanded the matter for resentencing further finding that the reasoning of the trial court for sentencing the defendant to the term were not substantial and compelling reasons.

This Court granted leave to appeal in this case asking the question of whether the court may use the conduct that give rise to the violation as a substantial and compelling reason to depart from the guideline sentence. The People assert that the guidelines do not apply to sentences for violation of probation. The People would also argue, that if this Court finds that the guidelines do apply to sentences for violation of probation, the fact that a defendant violates the conditions of the probation for which he must be resentenced is substantial and compelling reason to depart from the guidelines.

A.

The sentencing guidelines should not apply to sentences for violation of probation.

Sentencing guidelines do not apply to sentencing in a violation of probation case. As explained in *Hegwood*, at 436-437, the authority for setting the penalties for crimes rest within the legislature, but the authority to impose the sentence rests with the judiciary.

> It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only *within the limits* set by the Legislature.

Hegwood at 437.

The legislature of this State created guidelines and set forth their application in MCLA 769.34. The judicially created guidelines did not apply to felonies committed after January 1, 1999. Crimes committed on or after January 1, 1999 were to be sentenced under the legislatively created guidelines. The sentencing court could depart from the guidelines, but must state substantial and compelling reasons on the record. MCLA 769.34(3); *Hegwood* at 439-440; *People v Babcock*, 469 Mich 247, 255, 272 (2003)

The Court of Appeals in *Hendrick, supra,* discussed both MCLA 769.34(2)[1] and MCLA 771.4[2] and the concept of statutes in pari materia. Statutes in pari materia are those which relate to

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[1]M.C.L.A. 769.34(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. Both of the following apply to minimum sentences under this subsection:

(a) If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

(b) The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.

[2]M.C.L.A. 771.4 It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or

the same subject matter or share a common purpose. They must be read together as constituting one law, even if they contain no reference to one another and were enacted on different dates. When interpreting two statutes which arguably cover the same subject matter, they must be construed to preserve the intent of each and, if possible, interpreted in such a way that neither denies the effectiveness of the other. *Palmer v State Land Office Bd.,* 304 Mich 628, 636 (1943). *Paquin v Northern Michigan University,* 79 Mich App 605, 607 (1977).

Hendrick, supra further cites the principle in statutory construction that the Legislature is presumes to be aware of all existing statutes when enacting new legislation. There is also the principle that there is a rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation. *Dean v Chrysler Corp.,* 434 Mich 655, 667 (1990); *Pulver v Dundee Cement Co.*, 445 Mich 68,75 (1994),

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criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest. Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer as the court determines best serves the public interest. If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made. This section does not apply to a juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309.

This concept is important to recognize as there is the body of judicial opinions on the past judicially created guidelines that set forth the principle that the guidelines did not apply to probation violations. *Williams*, *supra*; *Edgett*, *supra*; *Reeves*, *supra.* The previous judicially created guidelines specifically stated:

> The Sentencing Guidelines do not apply to Habitual Offender Convictions. In order to develop guidelines for Habitual Offenders, the judge must record, on the SIR, when the offender is convicted as an habitual offender, the level of conviction, and the new statutory maximum.

Michigan Sentencing Guidelines, Second edition, 1988.

When the legislature created the statutory guidelines, they specifically included habitual offender crimes within the guidelines, which had not been included in the judicial guidelines of the past. The guideline instructions specifically state

> The appropriate sentence ranges for habitual offender sentence enhancement have been determined by increasing the upper limit of the appropriate cell as follows:
>
> 2nd Offense Habitual Offender - Increase Upper Limit by 25%
> 3rd Offense Habitual Offender-Increase Upper Limit by 50%
> 4th or Subsequent Offense Habitual Offender-Increase Upper Limit by 100%

The legislature was aware when they created the statutory guidelines that MCLA 771.4 stated, "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." This provision was also the law under the previous judicially created guidelines where the case law determined that the guidelines would not apply to probation violation.

The statute uses the permissive language of "may" rather than the mandatory language of "shall." The legislature could have required that a defendant be sentenced in the same manner, but allowed the statutory language to be permissive, and gave the sentencing judge the option of sentencing "in the same manner."

The legislature could have, as they did with habitual offenders, brought probation violation within the guidelines when they were created. The valid case law was still present, and they are presumed to have been aware of this case law. They did not bring probation violation within the guidelines and therefore the case law of *Williams*, *supra*; *Edgett*, *supra*; *Reeves*, *supra* should still apply. The sentencing guidelines should not apply to revocation of probation sentences.

B.

The sentencing court must use the fact that the defendant was on probation as a substantial and compelling reason for departing from the guidelines.

If this Court determines that the sentencing guidelines do apply to sentencing for violation of probation, then the violation itself should be a substantial and compelling reason for the sentencing court to depart from the guidelines. The rational of *Reeves,* although written during the period of time when the judicially created guidelines were in affect, is still appropriate today. The sentencing information report is created and the variables calculated at the time of the initial sentencing, the defendant receives or does not receive the points at that time.

MCLA 769.34(3) allows a sentencing court to depart from the sentence range calculated under the guidelines for substantial and compelling reasons. It states though that the court cannot use race, gender, ethnicity, occupation, lack of a job, religion, or other criteria as reasons to depart.

The statute continues to indicate that the court cannot base a departure on an offense or offender characteristic that has already been taken into account by the guidelines.

Prior record variable 6 does assess 10 points if "The offender is on probation or delayed sentence status, or on bond awaiting adjudication or sentence for a misdemeanor." Therefore, at the initial sentencing for an offense, the court should not depart from a sentence guideline range using the merely the fact that a defendant was on probation at the time of sentencing.

The People would assert that even this fact would be arguable, since the guidelines only assess 10 points whether there was only one offense that the defendant was on probation for, or numerous offenses that a defendant was on probation for. It would seem appropriate that the trial court could and should use the fact that a defendant had more than one probation case at the time of the sentencing offense to depart from the guidelines, where appropriate.

Here we are looking at a case where the court is sentencing the defendant for the violation of probation on an original offense. In such cases, the violation itself should be considered by the sentencing court as a substantial and compelling reason for departure.

Again, looking at MCLA 771.4, the legislature stated that probation is a matter of grace to a defendant, and there are no rights vested in the defendant. The statue then states:

> If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.

If this Court believes that the defendant must be sentenced in the same manner and to the same penalty as if there was no probation, then this Court has set forth the procedure for sentencing for a violation of probation in MCR 6.445(G). The court rule allows the sentencing court to continue

probation, modify any conditions of probation, or even revoke probation and impose a term of imprisonment. The rule states:

> The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provision set forth in MCR 6.425(B),(D)(2), and (D)(3).

Looking at the provision required for compliance, MCR 6.425(B) requires the court to allow the prosecutor and the defendant to examine the presentence report prior to sentencing, with allowances for exempt material. Section (D)(2) sets forth the sentencing procedure, and (D)(3) sets out the manner for resolution to any information challenged in the presentence report. It is important to note that MCR 6.445(G) does make any reference to compliance with MCR 6.425(D)(1), which states:

> (1) *Sentencing Guidelines*. The court must use the sentencing guidelines as provided by law. Not later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator.

There is no requirement that the sentencing court complete a new sentencing information report at the time of sentencing for violation of probation. A report has previously been completed at the initial sentencing for the offense. PRV 6, Relationship to the Criminal Justice System, would already have been calculated in this initial report.

Therefore, if the defendant had not been on probation at the time of the original sentencing, then there would have been no assessment of point for PRV6. The defendant would get nothing for violation of probation if he had not been on probation. On the other hand, if the defendant had been on probation at the time of the initial sentence, he would have received points for PRV6, which

would not take into account the newest probation violation, the one that the defendant is being sentenced for.

PRV 6 never takes into account how many times a defendant has been violated or been given a chance to be on probation. In this case, defendant Hendrick was on probation to Judge Fresard for receiving and concealing stolen property, when he was initially sentenced to probation for the attempted first degree home invasion. He appeared for a violation of probation hearing for failure to report. The court continued Hendrick on probation, although the court indicated that he was technically in violation. The defendant then came back before the court for violation of probation on that case for being charged with the offense of possession of a Molotov Cocktail and habitual fourth. After a plea and sentence agreement on the Molotov cocktail charge, the defendant was placed on probation for the possession of the Molotov Cocktail, with probation continued on the attempt home invasion. The defendant then appeared back in court for violation of probation on both the Molotov cocktail and the home invasion cases due to being charged with the offense of felon in possession of a weapon. This all took place between March 20, 2000 when the defendant first pled guilty to the attempt home invasion charge and August 23, 2001 when defendant was sentenced on the violations of probation for both cases. These numerous acts of violating the court's orders of probation all occurred with in a year and five months. For all of this, defendant Hendrick still only received 10 points for prior relationship to the criminal justice system.

A defendant who receives no points for prior relationship with the criminal justice system on the initial sentencing information report, or one who receives points for a prior relationship, in neither case are there any ramifications for a defendant violating the newest court order of probation. If a sentencing judge cannot consider the conduct of the violation of probation that brings the defendant

back before the court as a reason for departing from the previously scored sentencing guidelines, then the defendant does not have to be accountable for violating court orders of probation, even when he has been given numerous opportunities to conform his conduct to that expected in the community.

It is interesting to note that Florida Rule of Criminal Procedure 3.703, the state's sentencing guidelines does take into consideration, all violations of probation, unlike Michigan's statute. Section 17 of the Florida Rule assesses Community Sanction violation points when an offender has violated probation. The rule further states:

> Community Sanction violation points are assessed when a community sanction violation is before the court for sentencing. Six community sanction violation points shall be assessed for each violation or if the violation results from a new felony conviction, 12 community sanction violation points shall be assessed. Where there are multiple violations, points may be assessed only for each successive violation that follows a continuation of supervision, or modification or revocation of the community sanction before the court for sentencing and are not to be assessed for violation of several conditions of a single community sanction. Multiple counts of community sanction violations before the sentencing court shall not be the basis for multiply the assessment of community sanction violation points.

A defendant is thus given points for the number of times he violates his probation. This is not the case in this state.

If a court is never allowed to consider the fact that a defendant has violated its orders of probation by considering this a substantial and compelling reason for departure from the guidelines initially calculated when the defendant entered the system, then a defendant is never responsible for multiple violations of probation. It brings to mind the old Chines proverb, "Fool me once, shame on you. Fool me twice, shame on me."

A defendant should be held responsible when he ultimately violates orders of the sentencing court. This can be done when the violation of probation can be considered by the sentencing court as a substantial and compelling reason for departing from the guidelines.

Conclusion

The People assert that the sentencing guidelines should not apply in cases of violation of probation. If this Court determines that the guidelines do in fact apply, then the actions of the defendant in violating the probation should be allowed to be considered by the sentencing court as substantial and compelling reasons for departure.

RELIEF

WHEREFORE, the People respectfully request this Honorable Court to reverse the decision of the Court of Appeals and reinstate the defendant's conviction.

Respectfully submitted,

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